

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

EDWARD LEE LEWIS,

Petitioner,

v.

CIVIL ACTION NO. 2:04-cv-1009
(Criminal No. 2:02-cr-42)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the court is the petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence [Docket 126]. This action was referred to the Honorable Mary E. Stanley, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommended that the court deny the petitioner's § 2555 motion.

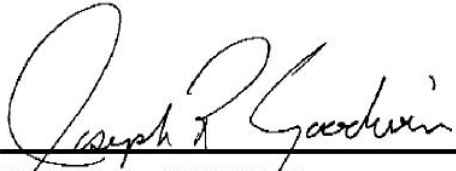
The court has reviewed the petitioner's objections to the Magistrate Judge's findings and recommendation and has reviewed the record de novo. The court **FINDS** that the objections are without merit. The court agrees with the Magistrate Judge that the issue of whether unconstitutional evidence was admitted has been raised on direct appeal and therefore the defendant is barred from raising the issue at this time. The court also agrees that the petitioner fails to demonstrate that the alleged failure to disclose exculpatory evidence can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the [outcome]." *Kyles v. Whitley*, 514 U.S. 419,

435 (1995). The court also agrees that the defense counsel's lack of inquiry into the petitioner's "alleged" alibi produced no harm because the evidence implicating the petitioner was overwhelming.

Accordingly, the court **ADOPTS** and incorporates herein the findings and recommendation of the Magistrate Judge, and **DENIES** the petitioner's § 2255 motion. The Court also **DENIES** the petitioner's motion for subpoena [Docket 145].

The court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge Stanley, counsel of record, and any unrepresented party.

ENTER: November 30, 2005



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE